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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 378

ROBERT E. HOWARD,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT

PETITIONER'S REPLY BRIEF

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The Brief For the United States In Opposition necessitates a few clarifications.

In order to argue that the lower court was correct in eliminating petitioner's intent as an element in the crime the respondent's brief

1. interprets 41 U.S.C. §§ 51, 54 as defining a crime which 'even the conflicting array of cases has yet devined,
2. miscites the legislative history of the statute, and
3. ignores case law (presumably so as not to admit the obvious conflict in Circuits which exists).

The respondent notes on page 7 of its brief:

> ". . . Whether an employee receiving a 'kickback' from a prospective subcontractor actually intends to influence the award of a subcontract or whether he merely intends to defraud the subcontractor by doing nothing, the payment is for the prohibited purpose. . . ."

The United States thereby admits that the employee must intend *something* to commit a crime under a constitutional interpretation of this statute. As the petition details (Pet. 10-12), the First Circuit opinion herein held to the contrary, but not even the lower court read into 41 U.S.C. §§ 51, 54 the purpose to protect government subcontractors by making it just as criminal to accept their "kickbacks" and then "doing nothing" as to induce the award of subcontracts as the *quid pro quo!* Such a legislative purpose would be absurd, and the Government, of course, cites no authority for its contrivance. The idea, however, further dramatizes petitioner's argument that the statute requires definitive interpretation by this Court to eliminate the "Caesar's wife law" connotations with which it has been impressed.

The "prohibited payment" of § 54 is one made "as an inducement for the award of a subcontract," as defined in § 51. The legislative history makes even clearer the meaning of the words. The legislative intent was to reach "individuals employed in the purchasing departments of the prime contractors" who receive the prohibited payments "for the purpose of inducing the award of future orders by their influence." *U.S. Code Congressional and Administrative News,* 79th Cong. 2nd Sess., 1946, p. 1082. The employee must intend to induce the award of a subcontract for his acceptance of a gratuity to be a crime. No-

where is there any hint that Congress also meant to prevent the bilking of subcontractors who have paid a bona fide "kickback" by an employee's subsequent inaction! The clear facts are to the contrary. Section 54 makes the payment by the subcontractor criminal and § 51 authorizes suit against the subcontractor by the United States to recover the amount of any "kickback."

The respondent also contends (Br. 7) that there are "no decisions. . .. contrary" to its unique delineation of the crime. In fact, as detailed in the petition on page 11, the Eighth Circuit has specifically held that *petitioner's* contention is correct: a defendant must intend to induce the award of a subcontract. In its conflicting holding here the First Circuit did not even cite the Eighth Circuit case, *Hanis* v. *United States,* 246 F. 2d 781 (8th Cir. 1957).

The respondent terms (Br. 7, n. 4) the argument in the petition (Pet. 7, 11-12) that the lower court's analogy to the bribery statute, 18 U.S.C. § 201, was faulty on the issue of the required intent as being "Petitioner's extension of the analogy. . . ." The Government then recognizes that the statutes are not analogous. A reading of the opinion below (Pet. 18-19) makes it clear that the First Circuit, however, considered its bribery analogy complete, including the issue of intent, but petitioner is content to point out that the Government thereby admits another of his arguments is correct: the bribery statute supports the petitioner on the issue of intent and is *not* an authority for the erroneous opinion below.

The respondent then, of course, logically must argue, as it does (Br. 7, n. 4), that in making 41 U.S.C. §§ 51, 54 far more restrictive (by *its* reading) than 18 U.S.C. § 201 Congress *intended* to require of a Raytheon janitor a higher standard of conduct than a federal judge. That posture, having no foundation, of course, falls of itself.

If the Government's argument and the opinion below are correct, however, and an employee need have no criminal intent (or as the Government prefers: can intend to induce or to defraud the subcontractor by *not* inducing!), that receipt of the gratuity *alone* equals guilt, what of petitioner's second question presented (Pet. 3)? The petition argued (Pet. 12-15) that the statute as so interpreted would be an unconstitutional shifting of the burden of proof to a criminal defendant. Respondent makes no answer to this point, preferring to say that there is but one "Question Presented" (Br. 2). This vital constitutional question is of itself reason to grant the writ, and the brief in opposition does not argue otherwise.

Respectfully submitted,

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